No. 96-1820

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1996

H. JASON GOLD, in His Capacity as Chapter 7 Trustee for Guy R. Detrick, GORDON P. PEYTON, in His Capacity as Chapter 7 Trustee for Donna Detrick and FAST FORWARD, INC.,

Petitioners,

vs.

PANALPINA, INC., PANALPINA AIRFREIGHT, INC., MULTI-MODAL FREIGHT SYSTEMS, INC., MULTI-MODAL FREIGHT SYSTEMS OF VIRGINIA and SYLVAN FRIEDMAN,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF IN OPPOSITION FOR RESPONDENTS PANALPINA, INC. AND PANALPINA AIRFREIGHT, INC.

EDWARD D. GREENBERG
Counsel of Record
DAVID K. MONROE
HELLE R. WEEKE
GALLAND, KHARASCH
& GARFINKLE, P.C.
Attorneys for Respondents Panalpina, Inc. and Panalpina Airfreight, Inc.
Canal Square
1054 Thirty-First Street, N.W.
Washington, D.C. 20007
(202) 342-5200

71369 (800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21 Lutz Appellate Services, Inc.

30 pp

QUESTION PRESENTED

1. May a party maintain a RICO claim filed more than four years after discovery of both the existence of his injury and the identity of the putative defendant?

RULE 29.6 LISTING

Panalpina, Inc.:

Panalpina, Inc.'s parent company is Panalpina World Transport Ltd., a Swiss corporation.

Panalpina, Inc. has no non-wholly owned subsidiaries.

Panalpina Air Freight, Inc.:

Panalpina Air Freight, Inc. no longer is in existence.

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Respondents Panalpina, Inc. and Panalpina Airfreight, Inc.[1] respectfully request that this Court deny the petition for writ of certiorari seeking review of the opinion of the United States Court of Appeals for the Fourth Circuit in this case.

STATEMENT OF THE CASE

A. Introduction

Petitioners[2] were contractors who operated Panalpina's warehouse pursuant to an at-will contract. Petitioners allege that sometime in 1989, Panalpina decided to engage in certain illegal billing practices, and as a result, determined it was necessary to remove petitioners from its warehouse. Petitioners contend that rather than simply exercising its right to terminate the warehouse contract on sixty days notice, Panalpina instead imposed a series of price cuts and other economic hardships over 15 months in order to force petitioners to leave. Petitioners did, in fact, abandon the warehouse contract in April 1990. Eleven months later, petitioners learned of the so-called illegal rebilling scheme, and immediately concluded that their economic troubles had been caused in some way by the rebilling activity.

Petitioners sought legal counsel, and determined that they had claims against Panalpina. Nonetheless, petitioners waited an additional four years — almost five years after they have been injured — to commence this action. Because petitioners delayed bringing their RICO claims until after the limitations period had passed, the District Court granted summary judgment

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1. These respondents are hereinafter collectively referred to as "Panalpina."

2. The term "petitioners" means the named petitioners herein and the named plaintiffs and appellants, Guy Detrick and Donna Detrick, in, respectively, the District Court and the Court of Appeals.

in favor of Panalpina. *Detrick v. Panalpina, Inc.*, No. 96-306-A (E.D. Va. filed Oct. 26, 1995). The Fourth Circuit affirmed. *Detrick v. Panalpina, Inc.*, 108 F.3d 529 (4th Cir. 1997).

Petitioners now seek to avoid the consequences of their own purposeful delay by urging upon this Court the application of a new accrual rule they have never raised below.

B. Course of Proceedings and Disposition of the Case Below

On March 9, 1995, petitioners filed a complaint alleging violations of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961, *et seq.*, ("RICO"), as well as a state law conspiracy claim under Virginia law. On May 19, 1995, petitioners filed a verified First Amended complaint. Petitioners alleged that respondents conspired to force petitioners to abandon their at-will warehouse contract with Panalpina in order to begin a fraudulent billing scheme directed at certain foreign governments.

Respondents moved to dismiss the complaint pursuant to Fed. R. Civ. P. 12(b)(6) on the grounds that the RICO and associated state law claims were barred by the statute of limitations. In opposition to the motion to dismiss, petitioners raised for the first time the defense of fraudulent concealment. The District Court denied the motion to dismiss in order to afford petitioners the opportunity to conduct discovery regarding fraudulent concealment.

At the close of discovery, respondents filed a motion for summary judgment on the grounds that petitioners' claims were barred by the statute of limitations. In addition, respondents argued that petitioners did not have standing to assert claims under RICO because there was no evidence that petitioners had been injured by any racketeering activity or by the investment

of the proceeds of a RICO scheme. The District Court determined that the statute of limitations on petitioners' RICO claims began to run no later than April 1990, when petitioners were allegedly forced to terminate their contract. Accordingly, the District Court held that the four-year RICO statute of limitations expired no later than April 1994, almost a year before petitioners commenced this action. The District Court also found that petitioners had come forward with no evidence to support their allegations of fraudulent concealment, and dismissed the amended complaint as time barred. Based upon its ruling on the limitations issue, the District Court did not find it necessary to address respondents' standing argument.

Petitioners appealed to the Court of Appeals for the Fourth Circuit. On appeal, petitioners argued that under the "injury discovery" accrual rule, petitioners' RICO claims did not accrue until they had knowledge of both their injury and the fact that their injury was related to racketeering activity. Petitioners did not raise, argue, or even cite the accrual rule set forth in *United States v. Kubrick*, 444 U.S. 111 (1979), upon which they now seek to rely. The Court of Appeals found that petitioners' claim accrued at the latest in April 1990, when they were allegedly forced to abandon their warehouse contract, and thus held petitioners' RICO claims were time barred. In addition, the Court of Appeals affirmed the District Court's finding that petitioners had failed to present any evidence establishing fraudulent concealment.

Petitioners did not seek rehearing before the Court of Appeals, instead filing the instant Petition for a Writ of Certiorari with this Court.

C. Statement of Facts Pertaining to the Issues Raised by the Petition

Panalpina is an international freight forwarder in the

business of arranging for the worldwide transportation goods on behalf of its customers. (App. 26, 157).[3] Panalpina operated a warehouse facility in Sterling, Virginia. (App. 26). During the time period at issue, much of Panalpina's business at the Sterling warehouse related to the transportation of military equipment purchased from the United States by various foreign governments under what is known as the Foreign Military Sales Program ("FMSP"). Panalpina provided such transportation services to the government of Turkey pursuant to a contract executed in November 1988. (App. 665).

On October 24, 1988, Panalpina executed a contract with Northeast Container Corporation ("Northeast"), pursuant to which Northeast agreed to provide warehouse services at the Sterling warehouse. (App. 309).[4] The warehouse services Northeast committed to provide included unloading freight from trucks, logging the freight in, storing the freight in the warehouse, and packing it for overseas shipment. (App. 362-364). The warehouse contract was terminable at-will by either party on 60 days notice. (App. 311, 360-61).

The contract specified that Northeast would be paid 3.5 cents per pound for handling large freight. (App. 312). According to Guy Detrick, however, Northeast and Panalpina had previously agreed to a rate of 4.5 cents per pound for large freight, but Panalpina unilaterally lowered the rate during the negotiations leading to the warehouse contract. (App. 377-78). Mr. Detrick further testified that Panalpina justified that decrease by claiming that Sylvan Friedman ("Friedman"), and his companies, Multi-Modal Freight Systems, Inc. and Multi-Modal

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3. References to the joint appendix lodged with the Court of Appeals are designated "App. __.".

4. Northeast Container was a company partially owned and operated by the Detricks.

Freight Systems of Virginia (collectively "Multi-Modal"), would do the work for only a penny a pound. (App. 378).

In early 1989, Northeast began to process the Turkish/ FMSP freight moving through the Sterling warehouse. Because the volume of this freight was very large, Panalpina requested that the rate for handling large Turkish freight be lowered from 3.5 cents per pound to 2.5 cents per pound. (App. 595-600). Although Mr. Detrick was unsure whether Panalpina had a contractual right to reduce the rate for Turkish freight, and complained about the reduction, he ultimately agreed to it. (App. 595-600). On June 7, 1989, Panalpina again requested a reduction in the rate for handling Turkish freight, this time from 2.5 cents per pound to two cents per pound. (App. 600, 795). Panalpina indicated that the reduction was necessitated by a budget forecast which indicated that Panalpina was experiencing a drastic increase in its cost of warehouse handling. (App. 795). Northeast agreed to this requested reduction as well. (App. 606). Thereafter, the only change in the rate for Turkish freight was an increase in the fall of 1989. (App. 1063-64).

During the same period in which the rate reductions took place, Mr. Detrick observed that Sylvan Friedman was a regular visitor to the Sterling warehouse. (App. 948). Mr. Detrick was also aware that Mr. Friedman had a copy of Northeast's contract with Panalpina, and knew the rates that Northeast was being paid thereunder. (App. 948).

Mr. Detrick also testified that, in early 1989, Panalpina began to impose other economic hardships on Northeast. These hardships included chargebacks unrelated to the warehouse contract, unreasonable demands for more personnel, and refusals to lease additional space. (App. 44). Mr. Detrick was able to describe a few examples of chargebacks occurring in early 1989, involving several hundred dollars. (App. 608-27).

Panalpina's alleged demands for increased staffing began in early 1989. (App. 627-29). The freight relating to the Turkey FMSP contract had completely filled the Sterling warehouse, and Panalpina determined that additional labor would be necessary to clear it out. (App. 628). Mr. Detrick believed that the solution to the warehouse problem was to increase the amount of available warehouse space, and requested Panalpina to do so. (App. 628-29, 633). Panalpina refused to lease more space, however, and between February and May 1989, Northeast gradually added five to seven employees to its staff. (App. 630-32).

In May 1989, the Detricks requested that Panalpina permit Fast Forward, Inc. ("Fast Forward") to take over the warehouse services contract from Northeast. (App. 366-67).[5] Panalpina agreed, and in September 1989, a new terminable at-will contract was executed between Panalpina, Fast Forward, and the Detricks. (App. 940). In connection with the new contract, petitioners requested an increase in the rate for Turkish freight to which Panalpina agreed. (App. 1063-64). These increased rates remained in effect until petitioners terminated their contract with Panalpina. (App. 1064). During this time period, Fast Forward obtained a security clearance from the Department of Defense and began handling classified freight at the Sterling facility for Panalpina. (App. 43, 950).

In February of 1990, Mr. Detrick advised Panalpina that he was having difficulty making payroll and paying his vendors. (App. 636-39). The following March or April, petitioners abandoned the warehouse contract because it had become unprofitable. (App. 636).

On March 19, 1990, Panalpina engaged Multi-Modal to

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5. Fast Forward was a company formed and wholly-owned by the Detricks.

replace petitioners as the warehouse service provider at the Sterling facility. (App. 798). Multi-Modal took over the Sterling warehouse the day after petitioners abandoned the contract, using former Fast Forward employees and equipment belonging to Fast Forward. (App. 948). Mr. Detrick testified that he observed that "within days, all of the obstacles which had destroyed Northeast were removed. More space was leased, rates were increased 50% or more, chargebacks were eliminated, equipment was purchased from Multi-Modal by Panalpina, expenses were paid." (App. 948). These observations caused Mr. Detrick to wonder "how Friedman could accomplish in such a short time all that I had been asking for so long." (App. 948).

Although petitioners had abandoned the warehouse services contract, they nonetheless insisted that they continue to handle classified freight at the Sterling facility. (App. 414). Panalpina agreed, and petitioners began providing services and invoicing for the handling of classified freight in April 1990. (App. 419). A formal classified services contract between petitioners and Panalpina was executed in August 1990. (App. 944). Petitioners continued to provide classified services out of the Sterling facility until January 1991, when, at the request of the Defense Investigative Service, they moved to a nearby location. (App. 409-11).

In addition, during the spring of 1990, both Guy and Donna Detrick were hired by respondent Multi-Modal. (App. 383-84, 422-23). The Detricks worked in Multi-Modal's offices located at the Panalpina warehouse, and had complete access to documents generated by that office. (App. 429-31). Mr. Detrick was hired as a salesman, and occasionally worked in Multi-Modal's office in Baltimore, where he had access to documents generated in that office. (App. 429-31). Mrs. Detrick performed clerical work at the Sterling warehouse. (App. 430).

In October or November 1990, Mr. Detrick discovered a Multi-Modal note and invoice which had been sent to Panalpina for classified packaging work. (App. 413). Mr. Detrick knew that Multi-Modal was not providing classified services to Panalpina, and concluded that the invoice was a phony. (App. 413). He later provided these documents to the government as part of what he believed to be evidence of illegal conduct at the Sterling warehouse. (App. 69-70).

Petitioners conducted no investigation or inquiry regarding the injuries they had suffered until a former Fast Forward employee approached Guy Detrick with allegedly suspicious invoices on March 11, 1991. (App. 319). On that same day, Mr. Detrick noticed a stack of documents sitting in plain view in the copy room at the Panalpina warehouse, which led him to conclude that Panalpina was involved in "something big" relating to its billing for inland freight. (App. 388-89).

On the evening of March 11, 1991, Mr. Detrick returned to the Panalpina warehouse and made copies of the documents he had seen earlier in the copy room, which had remained there undisturbed. (App. 391-93). Mr. Detrick took the documents home, studied them, and concluded that Panalpina was conducting an illegal "rebilling scheme" in the Sterling warehouse, and that this was the reason that he and his company were forced out of their contract with Panalpina. (App. 394, 948).

At a later date, Mr. Detrick returned to the Panalpina warehouse after business hours and took more documents relating to the alleged rebilling scheme. (App. 395). This time, he not only removed documents from the copy room, he also took documents that were in plain view on the desk of a Panalpina employee. (App. 396-98). Thereafter, Mr. Detrick continued to see documents relating to the alleged rebilling

scheme spread throughout the Sterling warehouse. (App. 434-35).

Petitioners began consulting various attorneys almost immediately concerning what causes of action they might have relating to the rebilling scheme. (App. 451-454). Petitioners also brought their findings to various government agencies, including the Internal Revenue Service, the State Department, the Department of Defense, and ultimately in the summer of 1991, to the United States Attorneys office for the Eastern District of Virginia. (App. 320-351). By this time, petitioners believed they had sufficient evidence to pursue claims against Panalpina. (App. 399). Indeed, during their meeting at the U.S. Attorney office, petitioners discussed the possibility of bringing a civil suit against Panalpina, perhaps a RICO claim. (App. 348-351). Petitioners did not file their claims, however, until March 1995, almost five years after they were allegedly forced to abandon their warehouse contract.

D. Correction of Misstatements in the Petition

Pursuant to United States Supreme Court Rule 15.2, respondents hereby bring to the Court's attention the following misstatements of fact and/or inaccurate citations to the record contained in the petition:

1. Petitioners assert that they raised below the accrual rule formulated by this Court in *United States v. Kubrick*, 444 U.S. 111 (1979). (Pet. 10). Petitioners neither cited the *Kubrick* case nor argued the applicability of the *Kubrick* accrual rule to RICO claims in the District Court or the Court of Appeals.

2. Petitioners allege for the first time in this Court a conspiracy between Panalpina and Friedman to fraudulently overbill for warehouse services. Petitioners contend that they

stood in the way of this new objective of the rebilling scheme, and therefore were direct victims of the RICO rebilling scheme. As a preliminary matter, these assertions of fact are in no way supported, much less established, by the citations to the record. Indeed, the citations purporting to support this conspiracy to overbill for warehouse services are citations to petitioners' complaint and the invocation of the Fifth Amendment by several Panalpina employees. Petitioners' desire to rely upon "negative inferences" arising from the invocation of the Fifth Amendment by certain Panalpina employees does not substitute for evidence necessary to meet the burden of production on a motion for summary judgment. Moreover, none of the witnesses were even asked about any scheme to overbill for warehouse services. In fact, the whole idea of a conspiracy to overbill for warehouse services is not only unsupported, it is fanciful. Panalpina did not bill its FMSP customers for warehouse services, and thus could not possibly have fraudulently overbilled for warehouse services, even if it had wanted to do so. More to the point, there is no evidence whatsoever on the record even suggesting such a scheme.

3. Similarly, petitioners' allegation that respondents used the proceeds from the alleged racketeering activity to subsidize below-market rates for warehouse services is completely unsupported in the record. Indeed, such a suggestion is directly contradicted by the evidence of record which demonstrates that Panalpina paid Multi-Modal *higher* rates for warehouse services than it had previously been paying petitioners. (App. 948).

4. Although petitioners repeatedly assert that Panalpina engaged in rebilling activity designed to defraud the United States, there is no evidence to support that allegation. Indeed, Panalpina's relationships with its FMSP customers were strictly commercial, and the United States was not involved in any way in paying for Panalpina's transportation services.

REASONS FOR DENYING THE WRIT

I.

THIS CASE IS NOT AN APPROPRIATE VEHICLE FOR DETERMINING THE CORRECT RULE OF ACCRUAL FOR CIVIL RICO CASES.

A. Petitioners' RICO Claims are of Extremely Dubious Validity.

Petitioners suggest that this case presents a paradigm of civil racketeering activity making it a particularly suitable vehicle for deciding a uniform rule of accrual for all civil RICO cases. However, petitioners' RICO claims are typical only in the sense that they demonstrate how far creative lawyers will seek to stretch routine commercial claims in order to obtain the enhanced remedies of civil RICO. When one puts aside the rhetoric and examines the facts, whatever injuries petitioners might have suffered had no relationship to the alleged racketeering activity. It is not surprising, therefore, that plaintiffs have struggled throughout this case to even articulate, much less support with evidence, a coherent theory of how they were harmed by the alleged RICO "rebilling" scheme.

The alleged rebilling scheme upon which petitioners base their RICO claims involved the submission of marked up trucking bills to Panalpina's FMSP customer. Petitioners, who operated Panalpina's warehouse, were obviously not direct victims of this alleged scheme since they were not Panalpina's customer. Consequently, petitioners sought to argue below that they were injured by the investment of proceeds of the rebilling activity. However, petitioners have never been able to explain exactly how the proceeds were invested, or how they were injured by that investment.

Initially, petitioners claimed that they were forced to abandon their at-will warehouse contract so that the rebilling scheme could begin. When Panalpina pointed out that petitioners could hardly be injured by the investment of the proceeds of rebilling which did not commence until after petitioners had already suffered all of their injuries, petitioners claimed that the rebilling had begun prior to the time they were forced out of the warehouse. This new theory still did not explain how the proceeds of the rebilling had been invested in a manner in which to injure petitioners.

Accordingly, petitioners later asserted yet another theory of causation, claiming that the retention of the proceeds of prior rebilling undertaken by the "Friedman enterprise" with another company was the investment of proceeds upon which they relied. Petitioners argued that the investment of these proceeds in the "Friedman enterprise" lured Panalpina into the rebilling scheme. This third theory of causation is highly suspect because the proceeds upon which petitioners rely arose from different and separate rebilling activity unrelated to Panalpina. In addition, established case law provides that the mere retention of the proceeds of racketeering activity is not sufficient to establish causation under § 1962(a). *See, e.g., Lightning Lube, Inc. v. Witco Corp.*, 4 F.3d 1153, 1188 (3d Cir. 1993); *Pemberton Sales & Serv. v. Banco Popular de P.R.*, 877 F. Supp. 961 (D. V.I. 1994); *Princeton Economics Group, Inc. v. Am. Tel. & Telegraph Co.*, 768 F. Supp. 1101 (D. N.J. 1991); *Grove Fresh Distrib. Inc. v. Flavor Fresh Foods, Inc.*, 720 F. Supp. 714 (N.D. Ill. 1989); *Teti v. U.S. Healthcare*, Nos. 88-9808, 88-9822, 1989 WL 157090 at *1 (E.D. Pa. 1989), *aff'd mem.*, 904 F.2d 696 (3d Cir. 1990); *In re Rexplore Inc. Sec. Lit.*, 685 F. Supp. 1132 (N.D. Cal. 1988).

In the petition, petitioners have advanced a new theory of causation. Petitioners now suggest that the proceeds of the

rebilling activity were used to subsidize below-market rates paid to Friedman/Multi-Modal when they replaced petitioners as the operators of Panalpina's warehouse. Petitioners apparently suggest that they were harmed because the proceeds of racketeering activity were used to subsidize their competitor. Once again, however, the evidence of record does not support petitioners' theory of causation. Nothing in the record suggests that Multi-Modal was paid below-market rates for providing warehouse services. Indeed the uncontested evidence of record is that Panalpina paid Multi-Modal higher, rather than lower, rates than petitioners were receiving under their warehouse contract. (App. 948). Accordingly, the proceeds of rebilling were not used to subsidize petitioners' competitor, and petitioners were not the direct or indirect victims of the rebilling scheme.

Petitioners also argue that the circumstances of this case demonstrate a clear distinction between the application of a pure "injury discovery" rule and an accrual rule requiring discovery of the source of the injury. However, this is not a case in which a party failed to discover the existence of racketeering activity until more than four years after the injury occurred. In this case, petitioners discovered the alleged racketeering activity eleven months after they abandoned the warehouse contract — well within the four-year limitations period provided under the "injury discovery" rule of accrual. Upon discovering the alleged rebilling scheme and recognizing that they had a potential RICO action against respondents, petitioners waited almost four more years to commence this action.[6] Consequently, petitioners were not

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6. Although petitioners have never explained why they waited so long to bring this action, petitioners used the interim period to go through bankruptcy proceedings to discharge their substantial debts before bringing this action. The causes of action asserted in this action, were not listed among petitioners' assets during their respective bankruptcies, although petitioners

(Cont'd)

prejudiced by the application of the "injury discovery rule", but rather by their own decision to delay filing until the limitations period had expired.[7]

This Court's recent actions in twice granting certiorari on the accrual issue suggest that the Court believes the time is right to establish a uniform accrual rule. However, this Court should not determine a rule of accrual for all civil RICO cases based on the facts and circumstances in this case — which presents none of the typical issues relating to the accrual of a true RICO claim.[8]

B. Petitioners Never Sought Application of the *Kubrick* Rule in the District Court or the Court of Appeals.

Petitioners did not argue below for the adoption of the *Kubrick* accrual rule; it was not even mentioned in any of their briefs filed in the District Court or the Court of Appeals.[9] Thus,

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(Cont'd)
were well aware of their claims. Petitioners advised their respective trustees of the existence of the claims asserted in this action only when respondents sought to have petitioners dismissed as improper plaintiffs. This occurred years after they had received discharges from bankruptcy.

7. Moreover, petitioners cannot credibly argue that the existence or application of the "injury discovery" rule set forth in *Pocahontas Supreme Coal Co. v. Bethlehem Steel Corp.*, 828 F.2d 211 (4th Cir. 1987) was somehow unclear.

8. Petitioners also suggest that criminal charges and convictions relating to the government's investigation of rebilling demonstrate that real criminal racketeering took place. However, the government has neither charged, nor convicted, anyone of racketeering relating to rebilling.

9. In the Court of Appeals, petitioners primarily argued that the District Court had failed to properly apply *Pocahontas* to the case before it. The (Cont'd)

the courts below were not presented with, nor did they decide, the substantive issue pressed in the instant petition for certiorari.

This Court's practice generally precludes the grant of certiorari where the issue was not presented or passed upon below. *United States v. Williams*, 504 U.S. 36, 40 (1992).[10] "Ordinarily, [the Supreme Court] does not decide questions not raised or resolved in the lower courts." *Taylor v. Freeland & Kronz*, 503 U.S. 638, 646 (1992) (citing *Youakim v. Miller*, 425 U.S. 231 (1976)). *See also Holly Farms Corp. v. N.L.R.B.*, 116 S. Ct. 1396 (1996) (citing *Matsushita Elec. Indus. Co. Ltd. v. Epstein*, 116 S. Ct. 873 (1996)). In *Holly Farms*, this Court, declined to entertain an argument not advanced below. 116 S. Ct. 1402, n. 7. Only where a case presents exceptional circumstances will the Court depart from its usual practice and consider issues not raised below. *See, e.g., United States v. Alvarez-Sanchez*, 511 U.S. 350, 360, n. 5 (1994) ("[f]inding no exceptional circumstances that would warrant reviewing a claim that was waived," this Court adhered to its general practice and declined to address respondent's Fourth Amendment argument.)

(Cont'd)
District Court held that plaintiffs' claims were time barred because plaintiffs suffered the injury in April 1990, and they did not commence the lawsuit until March 1995, outside the 4-year statute of limitations established by the Supreme Court in *Agency Holding Corp. v. Malley-Duff & Assoc., Inc.*, 483 U.S. 143 (1987).

10. The fact that Court's practice does permit review of an issue not pressed below as long as that issue was passed upon, *United States v. Williams*, 504 U.S. 36, 40-41 (1992), does not alter the application of this practice to the instant petition. Here, neither the District Court nor the Court of Appeals passed upon the question of the applicability of the *Kubrick* rule of accrual to the present action.

This particular case presents no compelling reasons or exceptional circumstances why the Court should depart from its traditional practice precluding the grant of certiorari when the question presented was not pressed or passed upon below. Furthermore, because the question raised in the petition for certiorari was not presented to the courts below, this Court is deprived of the benefit of reviewing the reasoning and practical experience of each of the courts below in its consideration of the issues before it. Additionally, different factual and policy consideration would bear on the application of the *Kubrick* rule. These considerations are more properly developed in the trial court.

C. Application of the *Kubrick* Accrual Rule to this Case Would Not Change the Outcome.

The Court should refuse to grant certiorari as this case is not the appropriate means of addressing the *Kubrick* accrual rule for civil RICO cases. Petitioners' claims would be time barred even if the *Kubrick* rule were applied in this case.

1. The Kubrick Rule of Accrual Requires Only That a Plaintiff Have Constructive Knowledge That a Defendant Caused His Loss, Not That Plaintiff Know the Exact Nature of His Claim.

In *United States v. Kubrick*, 444 U.S. 111 (1979), this Court defined a rule of accrual for medical malpractice claims under the Federal Tort Claims Act. This Court held that a medical malpractice cause of action accrues when plaintiff knows of both her injury and the putative cause of her injury. The Court distinguished between knowledge of the probable causation and knowledge of the nature of the claim. *Id.* at 123-24. In other words, *Kubrick* does not require a plaintiff to know the exact nature of his claim in order for the cause of action to accrue.

Rather, *Kubrick* requires only that plaintiff have knowledge of his injury and constructive knowledge that a defendant caused his loss. Moreover, the injured plaintiff need not know which cause, if many are possible, is the governing cause. The plaintiff only needs to know or have reason to know of a potential cause.

The *Kubrick* rule of accrual, thus, imposes on an injured plaintiff an affirmative duty to investigate the potential cause of his injury after he has discovered his loss or injury. *Fries v. Chicago & N.W. Transp. Co.*, 909 F.2d 1092, 1096 (7th Cir. 1990) (quoting *Kubrick*, 444 U.S. at 123). In *Kubrick*, this Court stated that when plaintiffs have knowledge of the critical facts concerning their injuries, they are charged with a duty to investigate promptly and present any claim for relief. 444 U.S. at 123. Hence, a plaintiff has an affirmative duty to inquire as to the legal cause of his injury (or the nature of his claim) after becoming aware of the existence of the injury and its potential cause. This affirmative duty to investigate has been widely applied in medical malpractice cases arising under the Federal Tort Claims Act. *See, e.g., Chamness v. United States*, 835 F.2d 1350 (11th Cir. 1988); *Nemmers v. United States*, 795 F.2d 628 (7th Cir. 1986), *on remand*, 681 F. Supp. 567 (C.D. Ill. 1988), *aff'd*, 870 F.2d 426 (7th Cir. 1989); *Arvayo v. United States*, 766 F.2d 1416 (10th Cir. 1985); *Gilbert v. United States*, 720 F.2d 372 (4th Cir. 1983); *Mendez v. United States*, 732 F. Supp. 414 (S.D.N.Y. 1990); *Oberlin v. United States*, 727 F. Supp. 946 (E.D. Pa. 1989); *Cragin v. United States*, 684 F. Supp. 746 (D. Me. 1988); *Dessi v. United States*, 489 F. Supp. 722 (E.D. Va. 1980).

In sum, under *Kubrick*, once the duty to investigate arises (*i.e.*, when a plaintiff has knowledge of his injury and its potential cause), the statute of limitations begins to run against the potential claims.

2. Applying the Kubrick Rule of Accrual to the Facts of this Case Would Not Alter the Outcome — Petitioners' Claims Would Still Be Barred.

Petitioners admit that under *Kubrick*, once a plaintiff is aware that he has sustained a loss and that the loss could have been caused by a putative defendant, it is reasonable to put the plaintiff to the burden of exercising diligence to investigate, to retain counsel, and to bring suit within the limitations period. (Pet. 15). This means that under the *Kubrick* rule, a RICO plaintiff has four years to bring his claims from the time he discovers his loss and that the loss has been caused by a putative defendant. *See Agency Holding Corp. v. Malley-Duff & Assoc., Inc.*, 483 U.S. 143 (1987) (adopting a uniform four-year statute of limitation in civil RICO actions).

In this case, petitioners waited more than four years to commence this action from the time they had this essential knowledge. In April 1990, petitioners admittedly knew that they had sustained an economic loss — the relinquishment of the warehouse contract. (Pet. 14). However, petitioners also knew in April 1990 that Panalpina — which had imposed the rate cuts and other economic hardships leading to the abandonment of the warehouse contract — was the putative cause of their injury. Thus, in April 1990, petitioners had knowledge of the essential facts which, even under *Kubrick*, started the limitations clock running and charged them with the affirmative duty to investigate the nature of their claims.

Although petitioners admit that they had reason to know that they had a potential contract action, (Pet. 18), they argue that they had no knowledge that they had a potential RICO action. *Kubrick* made clear, however, that knowledge of the exact nature of the claim is not required for the claim to accrue. Petitioners had four years from April 1990 to investigate and

discover their RICO claim. As events turned out, petitioners *did* discover their alleged RICO claim within the allotted four years. They had more than three years from that discovery to bring suit; they simply neglected to file in time.[11]

II.

KUBRICK IS NOT THE APPROPRIATE STANDARD FOR CIVIL RICO CASES AND IS CONTRARY TO THE POLICIES UNDERLYING STATUTES OF LIMITATION.

The *Kubrick* holding was narrowly tailored to decide the specific question of when a claim accrues within the meaning of the Federal Tort Claims Act. The ruling was fashioned as an exception to the general rule that "limitations begin to run from the time the plaintiff could sue," *i.e.*, when the right of action is complete. *Clark v. Iowa City*, 87 U.S. (20 Wall.) 583, 598 (1895). The *Kubrick* standard was developed in the narrow context of medical malpractice, where it is sometimes difficult to determine that an injury was caused by a putative defendant. This explains why most courts have restricted the application of *Kubrick* to medical malpractice cases. *See, e.g., Wilkinson v. United States*, 677 F.2d 998 (4th Cir.), *cert. denied*, 459 U.S. 906 (1982); *Wollman v. Gross*, 637 F.2d 544 (8th Cir. 1980).

Only in latent tort cases, such as occupational disease cases, toxic substance litigation and product liability actions against drug manufactures, has the *Kubrick* standard been extended beyond the medical malpractice arena. *Dubose v. Kansas City Southern Ry.*, 729 F.2d 1026 (5th Cir. 1984) (occupational

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11. Petitioners also argue that the pendency of *Klehr v. A.O. Smith Corp.*, No. 96-663, before this Court somehow mandates grant of certiorari in this case. However, whatever the result in *Klehr*, this case is especially poorly suited to serve as the test case for determining the appropriate accrual rule for civil RICO cases, as discussed more fully above.

disease); *Stoleson v. United States*, 629 F.2d 1265, 1269 (7th Cir. 1980) (occupational disease); *Yustick v. Eli Lilly & Co.*, 573 F. Supp. 1558 (E.D. Mich. 1983) (drug manufacturer liability); and *Moll v. Abbot Lab.*, 482 N.W. 2d 197 (Mich. App. 1992) (drug manufacturer liability). These types of cases are similar enough to the medical malpractice context to warrant a clear "source of the injury rule." In contrast, the policies that justified the application of the *Kubrick* accrual rule in those cases, do not apply to RICO actions. There are no parallels between the tort claim presented before the Court in *Kubrick* and the typical RICO claim. The fact of injury, as well as the identity of the putative defendant, is not generally difficult to determine in a RICO case.

Furthermore, applying the *Kubrick* rule of accrual would be contrary to the policies underlying statutes of limitations. In general, causes of action accrue and statutes of limitations begin to run when there is a "complete and present cause of action." *Rawlings v. Ray*, 312 U.S. 96, 98 (1941); *see also Moline Plow Co. v. Webb*, 141 U.S. 616, 623 (1891). The underlying policy and purpose of statutes of limitation is to

> promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. The theory is that even if one has a just claim, it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them.

Railroad Telegraphers v. Ry. Express Agency, Inc., 321 U.S.

342, 348-49 (1944).[12] The accrual rule urged by petitioners is contrary to this policy and purpose — it is an open-ended standard setting no outer limits for when a plaintiff must bring his or her claims.

CONCLUSION

For all the foregoing reasons, this case is not an appropriate means of addressing the issue raised by the petition. Accordingly, the petition for writ of certiorari should be denied.

Respectfully submitted,

EDWARD D. GREENBERG
Counsel of Record
DAVID K. MONROE
HELLE R. WEEKE
GALLAND, KHARASCH
& GARFINKLE, P.C.
Attorneys for Respondents Panalpina, Inc. and Panalpina Airfreight, Inc.
Canal Square
1054 Thirty-First Street, N.W.
Washington, D.C. 20007
(202) 342-5200

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12. This Court in *Kubrick*, quoting with approval from *Railroad Telegraphers v. Ry. Express Agency*, 321 U.S. 342 (1944), went on to state that statutes of limitations "protect defendants and the court from having to deal with cases in which the search for truth may be seriously impaired by the loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents, or otherwise." 444 U.S. at 117.